STATE OF MICHIGAN

COURT OF APPEALS

DONNA MLOSTEK a/k/a DONNA STEWART, Plaintiff-Appellee,	UNPUBLISHED October 23, 2014
v	No. 317068 Delta Circuit Court
DONALD FRANCIS MLOSTEK, Defendant-Appellant.	LC No. 11-021393-DO

Before: MURPHY, C.J., and SAWYER and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce and associated postjudgment orders entered by the trial court. On appeal, defendant argues that the court erred by accepting plaintiff's expert's valuation and not that of defendant's expert relative to one of the parties' businesses, by dividing the equity in the parties' businesses equally, by awarding spousal support and attorney fees to plaintiff, and by impermissibly restricting the rights of third parties, i.e., the corporate business entities. We affirm.

I. VALUATION TESTIMONY

The parties owned several trucking and logistics companies during the marriage, all of which were awarded to defendant in the property division. There were six companies, four of which defendant was the sole shareholder and two that were jointly owned by the parties. There was testimony that both parties participated in establishing the businesses, and defendant was the sole shareholder of the two largest revenue-generating businesses, Niagara Logistics and Finesse, Inc. Both parties presented expert witnesses who provided opinion testimony concerning the value of the corporations. Defendant argues that the trial court erred by accepting the valuation of plaintiff's expert for Finesse over the opinion offered by his expert. Plaintiff's expert, an attorney, real estate broker, and certified public accountant, valued Finesse at $1.4 million. Finesse, which is an S corporation engaged in warehousing, owns a warehouse, office building, non-operating motel, and a house, encompassing five or six parcels of property on the county's tax rolls. As part of the overall calculation in valuing Finesse, a value had to be placed on the real estate, and plaintiff's expert utilized tax documents and the parcels' state equalized values (SEVs), doubling those amounts for a total of approximately $4.9 million. Plaintiff's expert testified that doubling the SEVs is "a common conservative way to determine value in real estate." Plaintiff's expert used the $4.9 million amount in conjunction with considering and

applying numerous other business appraisal factors in coming to the overall conclusion that Finesse had a book value of $1.4 million. This value was consistent with corporate financial statements from 2010-2011, showing shareholder equity in Finesse to be $1.4 million.

Defendant's argument on appeal challenges the use of SEVs in valuing the real estate in the computation of Finesse's overall value. Defendant's expert had appraised Finesse about 15 months before the trial on behalf of a bank for purposes of a refinancing. Defendant's expert employed an income approach to valuing the real estate held by Finesse, which approach he described as follows:

> Basically I said that this . . . was a place that . . . someone would purchase for an income-producing property. And then from there, I went through what the potential lease rates, gross income would be, and then went through the deductions as far as . . . taxes, vacancies, . . . collections, management fees, reserves, and then also insurance, to arrive at a net operating income. And from there, I used the cap rate of .082, which arrived at a value of $2,115,000. And then the excess land was then added in and rounded.

Using the income approach, defendant's expert opined that Finesse's real property was valued at about $2.7 million, approximately $2.2 million less than plaintiff's expert's valuation of the property. Utilizing the $2.7 million figure resulted in Finesse having $3.4 million in total assets, and after taking into consideration total liabilities of $4.2 million, it was defendant's position that Finesse had a book value of -$783,000 (negative equity). Defendant's expert, who did not use a sales comparison approach to appraising the real property given a lack of valid comparables that had been recently sold, examined 20 or so other properties in calculating prospective lease/income rates. Defendant's expert testified that he would never use SEVs to value or appraise real estate, as properties are often under or over assessed. On cross-examination, defendant's expert stated that he had not included the office building in his appraisal for the bank. He also indicated that several of the dollar amounts used as part of the income approach were estimations or projections and not based on actual numbers or circumstances relative to the current use of the property. For example, he deducted 5 percent from the estimated gross income for vacancies and collections, even though there was and had been one established tenant. Defendant's expert also testified that changes in the cap rate would affect his appraisal, and there had been no update since the appraisal 15 months earlier.

The trial court accepted the valuation given by plaintiff's expert, noting that he had some confidence in plaintiff's expert given that his valuation of Niagara Logistics, $3.6 million, came very close to the valuation of Niagara by defendant's expert, $3.4 million, which amount the court concluded was the more accurate value. With respect to the valuation by defendant's expert regarding Finesse, the court noted that the appraisal had been performed over a year earlier and that it was questionable because it relied on some components that were not accurate. The court stated that defendant's expert employed a potential gross annual income of $337,500, even though the tax returns for the previous three years showed an average net income of $477,000. The trial court concluded that defendant's expert's "methods may work in the world of real estate appraisal, but to help this Court, the income approach he used is not reflective of . . . reality."

Defendant argues that the court overvalued Finesse by $2.2 million and that the SEV approach used by plaintiff's expert, referred to as a rule-of-thumb approach, violated established professional standards for certified public accountants as provided by the *Statement on Standards for Valuation Services* (SSVS1), published by the American Institute of CPAs. Defendant also asserts that his expert was better qualified than plaintiff's expert to offer an opinion on the real estate value of Finesse because he was a certified commercial real estate appraiser, while plaintiff's expert did not claim to have this expertise.

"In deciding a divorce action, the circuit court must make findings of fact and dispositional rulings[,]" and findings of fact "are to be upheld unless they are clearly erroneous." *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). With respect to business valuations in divorce actions, this Court in *Jansen v Jansen*, 205 Mich App 169, 170-171; 517 NW2d 275 (1994), observed:

> Next, defendant asserts that the trial court erred in its valuation of plaintiff's business assets and continues to argue that her expert witness was more credible than plaintiff's expert witness. We find no clear error. The valuations of the parties' experts varied widely and were the subject of much dispute at trial. The trial court made its own evaluation on the basis of all the evidence presented, and, while some of the trial court's individual determinations may have been miscalculated, the court's valuation was within the ranges established by the testimony. A trial court has great latitude in determining the value of stock in closely held corporations, and where a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present.

We initially note that defendant does not direct us to any authority that precludes the use of SEVs in valuing real property for purposes of property division in divorce actions, nor are we aware of any such authority. Indeed, caselaw indicates that SEVs can be used by a trial court in setting the value of property. *Lee v Lee*, 191 Mich App 73, 76; 477 NW2d 429 (1991) ("We fail to see why the trial court would not accept the state equalized value as some evidence of the value of the home."). With respect to defendant's argument that using an SEV approach violated established, published standards set forth in the SSVS1, one of defendant's other experts read directly from the SSVS1 regarding rule-of-thumb approaches such as the SEV approach, stating, "'A rule of thumb is *typically* a reasonableness check against other methods used and should *generally* not be used as the only method to estimate the value of a subject interest.'" (Emphasis added.) The SSVS1, therefore, does not absolutely prohibit rule-of-thumb approaches as suggested by defendant.

Furthermore, the trial court's decision to use the valuation proffered by plaintiff's expert was not based on a conclusion that plaintiff's expert had superior credentials, nor that an SEV approach was necessarily and generally superior to an income approach. Rather, the trial court was concerned with problematic aspects of the valuation provided by defendant's expert, rightfully so in our view, given that it was a bit outdated and, more importantly, that it failed to fully take into account the *actual* circumstances involving the real estate. Additionally, the negative equity valuation argued by defendant was absurdly inconsistent with the 2010-2011 financial statements showing shareholder equity in Finesse to be $1.4 million.

Defendant's reliance on *Maake v Maake*, 200 Mich App 184; 503 NW2d 664 (1993), is misplaced. Although this Court, in reversing the trial court's valuation of a business, stated that the trial court had failed to recognize a distinction between the expertise of an accountant and an appraiser as to a business valuation, the primary basis for the reversal was the court's numerous factual mistakes regarding the business which affected the valuation. *Id.* at 187-188. Here, even though defendant's expert may have been more qualified generally than plaintiff's expert to determine the value of the real property owned by Finesse, there is no claim that plaintiff's expert was not qualified to give an opinion, and credibility issues associated with deciding which expert to rely upon were for the trial court to resolve. *SSC Assoc Ltd Partnership v Gen Retirement Sys of the City of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995).

Keeping in mind that a court has great latitude in determining the value of a business in dividing marital property, there was no error warranting reversal; the trial court's valuation of Finesse was within the range established by the proofs.

II. DIVISION OF BUSINESS EQUITY

Before the trial court rendered its decision on the division of the parties' assets, defendant asked it to award the parties' businesses to him with the exception of P-M Properties, which he suggested the court award to plaintiff as a source of continuing monthly income. Defendant's proposed property division, according to his calculations, would leave him with $3.2 million worth of assets and plaintiff with $1 million. In order to balance the equities, defendant suggested that the court award plaintiff thirty percent of the equity in the businesses, or $871,800, plus a lump-sum present payment of $240,742. Plaintiff requested a buyout of her equal interest in all of the businesses, with monthly payments to be made on an interest-bearing note for a period of 10 years.

The trial court concluded that both parties had worked equally hard to establish the businesses and make them successful. The court further found that because the businesses were interdependent or interconnected, splitting them was not a viable option, so it awarded all of the businesses to defendant and ordered him to pay plaintiff an equalizing sum. The trial court valued the marital estate, including the businesses, at around $6.7 million, and it found that defendant's portion of the divided property was worth approximately $5.7 million, while plaintiff's share was a little over $1 million. In order to equalize the division, the court determined that defendant would need to pay plaintiff about $2.3 million, and he was ordered to pay plaintiff said amount, allowing for monthly installment payments. To secure the payment, plaintiff was granted junior mortgages on any real property awarded to defendant, along with being granted security interests in defendant's interests in three of the businesses.

Defendant contends that the court's equal division of the businesses was inequitable because the evidence showed that he alone was responsible for the businesses' financial success, while plaintiff's contributions related only to "employee morale."[1] We disagree.

[1] Defendant did accept that all of the businesses constituted marital property subject to division.

A trial court has broad discretion in dividing a marital estate. *McDougal v McDougal*, 451 Mich 80, 88; 545 NW2d 357 (1996). The following factors should be considered by the court where relevant when dividing marital property:

> "(1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity." [*Id.* at 89 (citations omitted).]

It is not feasible, nor desirable, to establish a rigid framework for purposes of applying the relevant factors; there can be no strict mathematical formulations. *Id.* at 88. While the division of property need not be equal, it must be equitable. *Id.*

The court's division of property in the instant case was equitable. Despite defendant's contention that he alone was responsible for the financial success of the businesses, the trial court found differently after hearing both parties' testimony. We agree with the trial court that plaintiff showed that her contributions both directly to the businesses and to the parties' family life helped the businesses grow and flourish, allowing defendant to focus on them. In addition, plaintiff's uncontroverted testimony established that her salary as a school bus driver supported the family during the early years of the struggling businesses, allowing defendant to put any income generated by the businesses back into them for further growth.

III. SPOUSAL SUPPORT AND ATTORNEY FEES

The trial court found that plaintiff had $6,000 in monthly expenses, and that at age 60 she was "effectively retired and will not be otherwise employed" in the future. The court found that plaintiff would have access to about $1,500 per month from her own sources, including interest on a "large cash reserve" and payments from a retirement account, leaving a monthly shortfall of $4,500. The court ordered defendant to pay this amount as spousal support. Defendant argues that the spousal support award was inequitable because plaintiff received a substantial property settlement in the divorce judgment and had no minor children to support. Defendant also asserts that he is in "poor physical health" and has "reason to be pessimistic" about the future of his businesses because the main customer of his two largest businesses had filed for bankruptcy. We find these arguments unpersuasive.

"The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Spousal support should be "based on what is just and reasonable under the circumstances of the case." *Id.* The trial court's award in the instant case sought to balance the incomes of the parties by awarding plaintiff spousal support equal to about one-half of the parties' income, as indicated on their most recent tax returns. Defendant's objection that it was inequitable for the court to grant spousal support to plaintiff because she had already received an "equalizing sum" to balance the division of marital property ignores the fact that he also received a division of the marital property. And defendant was awarded all of the businesses, and those businesses generated the parties' income for the last several years of the marriage. Moreover, the court properly considered plaintiff's age, and noted that she was not likely to be employed in

the future. See *McDougal*, 451 Mich at 89. Regarding defendant's physical health problems, defendant did not testify that these problems had impacted his ability to tend to his businesses or that he expected them to do so in the future. The trial court also provided that the award was subject to modification or termination as future events dictate. Thus, defendant will always have the ability to petition the trial court if a change of circumstances arises that calls for reexamination of the spousal support award. Because defendant has not shown that the trial court's award of spousal support was unfair or inequitable, he is not entitled to reversal on this issue.

Similarly, defendant objects to the trial court's award to plaintiff of $30,000 for attorney and expert witness fees, contending that plaintiff had the ability to pay the fees without his assistance. The court found that the fees "were necessary for [plaintiff] to prosecute the divorce, and that she would have otherwise had to invade her spousal support needed to live [on] or the assets awarded to her to pay those fees." The court also found that defendant was able to assist in paying plaintiff's fees. Those factual conclusions were not clearly erroneous.

"A party in a domestic relations matter who is unable to bear the expense of attorney fees may recover reasonable attorney fees if the other party is able to pay." *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999); see also MCR 3.206(C)(2). Plaintiff was required to allege facts sufficient to show that she was unable to bear the expense of the action. MCR 3.206(C)(2). Defendant argues that plaintiff was able to pay the fees because her separate property included cash assets worth a total of approximately $150,000. However, as plaintiff notes on appeal, the trial court awarded plaintiff monthly spousal support of $4,500 instead of the $6,000 it found she needed to maintain her lifestyle, because plaintiff's cash assets would probably earn about $600 in interest per month that plaintiff could use towards her expenses, without invading the principal. Because the court determined that plaintiff's cash assets should be used for her maintenance, she should not be required to invade them for purposes of paying her attorney fees. See *Maake*, 200 Mich App at 189 ("A party may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support."). Accordingly, we conclude that the court's award of attorney fees was not an abuse of its discretion. *Id.*

IV. THIRD-PARTY RIGHTS

Pursuant to an order amending the judgment of divorce, defendant had to pledge, as part of the security for payment of the equalizing sum, his ownership interest in three of the corporate businesses awarded to defendant. Further, until full payment of the equalizing sum is made, defendant is prohibited from selling, transferring, or otherwise pledging any interest that he holds in those three entities without plaintiff's consent. Finally, the amendatory order provided that until the equalizing sum has been paid in full, defendant is prohibited from voting for or consenting to a variety of actions regarding the companies. This included issuing additional stock, admitting new members, selling any assets other than in the ordinary course of business, making any material change in the capital structure of the companies, mortgaging or granting a security interest in any of the companies' assets, guarantying the obligations of a person or entity by the corporations, entering into a long-term lease of any assets, distributing any assets other than in the ordinary course of business, or making excess or unreasonable payments of

compensation or consulting fees to shareholders, directors, officers, or employees by the companies other than what is typically paid in the industry.

On appeal, defendant argues that the trial court's order amending the divorce judgment impermissibly limited the rights of the third-party corporations of which defendant is sole owner. Michigan courts have recognized that a court, in divorce proceedings and as a matter of jurisdiction controlled by statute, cannot make an adjudication that affects the rights of a corporation or legal entity that was not a party to the divorce action. *Shouneyia v Shouneyia*, 291 Mich App 318, 323-324; 807 NW2d 48 (2011) ("The circuit court . . . did not have authority to adjudicate the rights of . . . [the corporation] without first making it a party to the [divorce] case.").

While defendant cites the principle of law from *Shouneyia*, the full extent of his explanation or argument as to the application of the principle to the language in the order amending the divorce judgment is as follows: "The court's restrictions and conditions in this case which affect defendant's corporate entities was clear error." This argument is woefully inadequate. "'It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments[.]'" *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) (citation omitted).

Furthermore, with respect to the requirement that defendant pledge his ownership interests in the corporations as security, the requirement does not even appear to be encompassed by defendant's cursory argument challenging conditions and restrictions affecting the corporations; the order affects defendant's interests in an individual capacity. Similarly, in regard to prohibiting defendant from selling, transferring, or otherwise pledging his interests in the corporations, the prohibitions bar acts by defendant, not the corporations, and pertain simply to defendant's interests in the corporations. With respect to precluding defendant from voting for or consenting to a variety of actions regarding the corporations, e.g., issuing additional stock, the prohibitions are again framed in terms of enjoining acts by defendant (voting and consenting), not acts by the corporations. To the extent that a valid argument could perhaps be developed to the contrary, defendant fails to develop such an argument.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael J. Kelly